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No. 83-1777

In the Supreme Court of the United States

OCTOBER TERM, 1983

CLYDE DAVID UMPHLETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the Federal Revenue Sharing funds he was convicted of embezzling were not "money * * * of the United States" within the meaning of 18 U.S.C. 641 and that the courts below improperly disregarded a stipulation in concluding that his actions were within the statute.

1. Following a bench trial in the United States District Court for the District of South Carolina, petitioner was convicted on one count of embezzling money of the United States in violation of 18 U.S.C. 641, and sentenced to three years' imprisonment and a $5000 fine. The court of appeals affirmed in a brief per curiam opinion that relied largely on the district court's decision (Pet. App. 1a-3a).

The evidence at trial, which was undisputed, established that petitioner, a county supervisor, used for his own benefit the services of an employee of the County Roads

and Bridges Department (Pet. App. 5a-6a). During the year in question, Federal Revenue Sharing funds deposited to the county's general bank account were allocated in part to the Roads and Bridges Department (*id.* at 8a-9a). The employee's salary was paid from the general account out of funds allocated to the Department (*id.* at 6a, 8a).[1]

The district court reasoned that the Revenue Sharing funds exhibited "ample indicia of federal supervision and control * * * to justify their being considered 'monies of the United States' for the purpose of a prosecution under § 641" (Pet. App. 14a). In reaching this conclusion, the court relied on a number of statutory and regulatory provisions that limit the uses that may be made of such funds and establish various audit and record-keeping requirements (*id.* at 13a-15a). The court noted that the government had stipulated that there were no "federal reporting requirements" with respect to funds allocated to the Roads and Bridges Department and that no "reimbursable funds" were so allocated, but it declined to consider itself bound by these stipulations to the extent that they conflicted with the relevant statute and regulations (*id.* at 13a n.3).

2. The decision below is manifestly correct and does not conflict with any decision of this Court or any court of appeals. Further review is therefore unwarranted.

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[1]Petitioner was acquitted on five other counts charging violations of Section 641. The district court determined that the government had failed to demonstrate that the funds involved in these counts were money of the United States because they related to years in which no federal funds were allocated directly to the Roads and Bridges Department. The court concluded that the government's evidence with respect to these counts, which established only that federal funds were deposited to the county's general account, did not prove that federal money was embezzled by petitioner in the course of his use of Department funds. Pet. App. 9a-12a.

a. Petitioner correctly notes (Pet. 7) that the critical factor in determining whether funds constitute "money * * * of the United States" under Section 641 is the extent to which the federal government retains supervision or control over the funds. See *United States* v. *Benefield*, 721 F.2d 128 (4th Cir. 1983); *United States* v. *Gibbs*, 704 F.2d 464, 466 (9th Cir. 1983); *United States* v. *McIntosh*, 655 F.2d 80, 83-84 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982); *United States* v. *Mitchell*, 625 F.2d 158, 160 (7th Cir.), cert. denied, 449 U.S. 984 (1980); *United States* v. *Evans*, 572 F.2d 455, 472 (5th Cir.), cert. denied, 439 U.S. 870 (1978). But there is no merit to his contention (Pet. 8) that Federal Revenue Sharing funds do not satisfy this test on the ground that such funds are provided to local governments on a "no strings" basis with "little, if any, [federal] supervision and control over [their] use." The district court properly concluded (Pet. App. 14a) that "federal controls [over Revenue Sharing funds] provided by the applicable statutes and regulations are extensive." These controls include[2] record-keeping and auditing requirements (31 U.S.C. (1976 ed.) 1243; 31 C.F.R. 51.100 *et seq.* (1979)), a prohibition against discrimination in programs operated by recipients of Revenue Sharing funds (31 U.S.C. (1976 ed.) 1242; 31 C.F.R. 51.50 *et seq.* (1979)), and a provision for repayment of funds for failure to comply with applicable requirements (31 C.F.R. 51.204 *et seq.* (1979)). These provisions demonstrate that the federal government retains a sufficient interest in Revenue Sharing funds to keep them within Section 641 even after they have been distributed. No case suggests a

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[2]Citations are to the statute and regulations in effect during 1978-1979, the time period covered by the count on which petitioner was convicted. The State and Local Fiscal Assistance Act of 1972, as amended, is now codified at 31 U.S.C. 6701 *et seq.*

contrary result,[3] nor, as the district court noted (Pet. App. 16a (footnote omitted)), would "any legitimate public interest [be] served by depriving Federal Revenue Sharing Funds from the protection of § 641."

b. Nor is there any merit to petitioner's claim (Pet. 4-7) that the district court improperly disregarded the stipulations of the parties in ruling that Federal Revenue Sharing funds fall within the ambit of Section 641. That ruling did not impermissibly conflict with the stipulations that the Roads and Bridges Department received no "reimbursable funds" or funds carrying "federal reporting requirements" during the years covered in the indictment.[4] The district court concluded that the Revenue Sharing funds received

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[3]Petitioner contends (Pet. 7-8) that *Goolsby* v. *Blumenthal*, 590 F.2d 1369 (5th Cir.) (en banc), reh'g denied, 597 F.2d 934, cert. denied, 444 U.S. 970 (1979), and *Carolina Action* v. *Simon*, 389 F. Supp. 1244 (M.D.N.C.), aff'd, 522 F.2d 295 (4th Cir. 1975), support his position that the Act's legislative history reflects a "no strings" policy encompassing little or no federal supervision over Revenue Sharing funds. To the contrary, these cases detail the substantial federal controls incorporated in the Act and the "impressive array of federal involvement in the Revenue Sharing procedure" (389 F. Supp. at 1249). The "no strings" reference in the Act's legislative history means only that "federal controls [over Revenue Sharing funds] were embodied within the Act itself" (590 F.2d at 1374) and that the Act did not make disbursement of the funds contingent on prior federal approval of the specific projects to be financed with such funds, or on submission of an environmental impact statement required under certain other federal programs (590 F.2d at 1374-1377; 389 F. Supp. at 1248-1249).

[4]It is important to note that petitioner does not claim that the effect of the stipulations was to require a finding that no Revenue Sharing funds were allocated to the Department. To the contrary, the parties agreed that such funds were allocated to the Department during fiscal year 1978 (C.A. App. 27). Accordingly, the only issue addressed by the stipulations petitioner now claims were disregarded is the purely legal one of the federal supervisory requirements applicable to Revenue Sharing funds. To the extent that the stipulations may conflict with the statute and regulations, the government's inadvertence may be attributed to its primary reliance at trial on another theory, rejected by the

by the Roads and Bridges Department retained their federal character for Section 641 purposes because of the federal record-keeping, auditing, anti-discrimination, and penalty provisions attached to the funds (Pet. App. 13a-15a). In reaching that conclusion, the court cited (*id.* at 14a) only a single reporting regulation, 31 C.F.R. 51.108 (1979), which required recipients to provide copies of their audit reports if requested by federal authorities. The court did not state that Revenue Sharing funds were "reimbursable"; in fact, it indirectly referred to the funds as "grants" (Pet. App. 8a). In any event, as the court of appeals held (Pet. App. 3a), the district court correctly concluded that it was not bound by the stipulations insofar as they conflicted with the applicable statute and regulations. See *Swift & Co.* v. *Hocking Valley Ry.*, 243 U.S. 281, 289 (1917); *King* v. *United States*, 641 F.2d 253, 258 (5th Cir. 1981); *United States* v. *One 1978 Bell Jet Ranger Helicopter*, 707 F.2d 461, 462 (11th Cir. 1983).[5]

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district court (see note 1, *supra*), that would have obviated the need to consider the federal character of Revenue Sharing funds (see Pet. App. 13a n.3).

[5]Contrary to his claim (Pet. 6-7), nothing in this decision even remotely raises a concern that petitioner was deprived of his right to a jury trial. The stipulations in question related to pure questions of law (see note 4, *supra*) that would have been for the court to decide on the basis of the statute and regulations even if the case had been tried to a jury. The cases cited by petitioner (Pet. 5-6) either do not support his position or are plainly inapposite. See *United States* v. *Montgomery*, 620 F.2d 753, 756-757 (10th Cir.), cert. denied, 449 U.S. 882 (1980) (government permitted to introduce additional factual evidence even though parties stipulated that case would be submitted to the court solely on the stipulations and the suppression hearing record); *Marshall* v. *Emersons, Ltd.*, 593 F.2d 565, 568-569 (4th Cir. 1979) (district court erred in disregarding a stipulation specifying the amount of back wages at issue in the lawsuit where parties did not enter into stipulation on basis of a mistake of law); *United States* v. *McGregor*, 529 F.2d 928, 931-932 (9th Cir. 1976) (district court had discretion to relieve the government of a stipulation that an extraneous murder would not be mentioned to the jury where defendant's cross-examination made the murder relevant).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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